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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. ——— 77-133

RUFUS ROLAND FAULK ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM
ARKANSAS SUPREME COURT

JURISDICTIONAL STATEMENT

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NO. ————

RUFUS ROLAND FAULK ..... *Appellant*

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JURISDICTIONAL STATEMENT

Appellant appeals from the final order and opinion of the Supreme Court entered May 2, 1977, and modified on rehearing on June 13, 1977, affirming the judgment of his conviction for the offense of Uttering, and submits this statement to show that the United States Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The substitute opinion of the Supreme Court of Arkansas is reported in 261 Ark. 543 (Advance Sheets). The substitute opinion on rehearing is set forth in Appendix "A" to the Jurisdictional Statement.

JURISDICTION

The opinion of the Supreme Court of Arkansas was delivered on May 2, 1977. A Petition for Rehearing was filed on May 16, 1977. A substitute opinion and final order on rehearing was entered on June 13, 1977, affirming the judgment of the Sebastian County Circuit Court sentencing Appellant to five years in the Department of Corrections on the offense of Uttering. Notice of Appeal was filed in the Supreme Court of Arkansas on May 25, 1977. A motion to stay the mandate of the Arkansas Supreme Court and to remain on bond was filed in the Arkansas Supreme Court on May 25, 1977. On June 13, 1977, the Arkansas Supreme Court entered an order granting Appellant's motion to stay mandate and to remain on bond pending appeal to the United States Supreme Court.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1257(2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment by direct appeal in this case: *Williams v. Bruffy*, 96 U.S. 176; *Lathrop v. Donohue*, 367 U.S. 820; and, *Marcus v. Search Warrant*, 367 U.S. 717.

UNITED STATES CONSTITUTIONAL PROVISIONS, ARKANSAS CONSTITUTIONAL PROVISION, ARKANSAS STATUTES AND RULES INVOLVED

The United States Constitutional Provisions involved are Amendments 6 and 14 and can be found in U.S.C.A., Constitution, Amendment 6 to 14, page 223.

Amendment 6 provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *.

Amendment 14 provides as follows:

> * * * No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Arkansas Constitutional provision involved is Article 2, Section 10 which can be found in Volume 1, page 33 of Arkansas Statutes Annotated (Official Edition).

Article 2, Section 10 provides as follows:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial * * *.

The Arkansas statutes involved are *Ark. Stat. Ann.* Sections 43-1708 and 1709 and can be found in Volume 4A at pages 130-131 of Arkansas Statutes Annotated, 1964 replacement (Official Edition).

Ark. Stat. Ann. §43-1708 provides as follows:

> If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner.

Ark. Stat. Ann. §43-1709 provides as follows:

> If any person indicted for any offense, and held to bail, shall not be brought to trial before the end of the third term of the court in which such indictment is

pending, which shall be held after the finding of such indictment, and such holding to bail on such indictment, he shall be discharged, so far as relates to such offense, unless the delay happened on his application.

The rule of criminal procedure involved is Rule 28 of the Arkansas Rules of Criminal Procedure and can be found on pages 59 and 60 of the printed rules (Official Edition).

Rule 28 provides as follows:

RULE 28. LIMITATIONS AND EXCLUDED PERIODS

RULE 28.1 Limitation.

(a) Any defendant charged with an offense in circuit court and committed to a jail or prison in this state shall be brought to trial before the end of the second full term of the court, but not to exceed nine (9) months, from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(b) Any defendant charged with an offense in circuit court and held to bail, or otherwise lawfully set at liberty, shall be brought to trial before the end of the third full term of court from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(c) This rule shall have no effect in those cases which are expressly governed by the "Interstate Agreement on Detainers Act" (Act 705 of 1971).

RULE 28.2 When Time Commences to Run.

The time for trial shall commence running, without demand by the defendant, from the following dates:

(a) from the date the charge is filed, except that if prior to that time the defendant has been continuously held in custody or on bail or lawfully at liberty to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode, then the time for trial shall commence running from the date of arrest;

(b) when the charge is dismissed upon motion of the defendant and subsequently the defendant is arrested or charged with an offense, the time for trial shall commence running from the date the defendant is subsequently arrested or charged, whichever is earlier;

(c) if the defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, the time for trial shall commence running from the date of mistrial, order granting a new trial or remand.

RULE 28.3 Excluded Periods.

The following periods shall be excluded in computing the time for trial:

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant. No pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period.

(b) The period of delay resulting from congestion of the trial docket when the delay is attributable to exceptional circumstances. When such a delay results, the court shall state the exceptional circumstances in its order continuing the case.

(c) The period of delay resulting from a continuance granted at the request of the defendant or his counsel.

(d) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:

(i) the continuance is granted because of the unavailability of evidence material to the state's case, when due diligence has been exercised to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(ii) the continuance is granted in a felony case to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional complexity of the particular case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

(f) If the charge was dismissed upon motion of the prosecuting attorney and thereafter a charge is filed against the defendant for the same offense or an offense

required to be joined with that offense, the period of delay from the date the charge was dismissed to the date the time limitations would commence running as to the subsequent charge had there been no previous charge.

(g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant acting with due diligence shall be granted a severance so that he may be tried within the time limits applicable to him.

(h) Other periods of delay for good cause.

QUESTION PRESENTED

1. Did the opinion and decision of the Arkansas Supreme Court so alter appellant's constitutional right to a speedy trial that it has denied him a speedy trial, due process of law and equal protection of the laws?

STATEMENT

On February 11, 1975, the Appellant along with a Co-Defendant, Twilla K. Belt, was charged by Information with the offenses of Forgery and Uttering and Possession of Stolen Property. The offenses were alleged to have been committed on February 7, 1975. The Appellant retained Jack Rose as his attorney and on February 11, 1975, he waived arraignment and entered a plea of not guilty.

On March 10, 1975, the State amended its Information against the Appellant charging that he was subject to the

habitual criminal statute in that he had been previously convicted of felonies; on March 13, 1975, the Appellant waived arraignment and entered a plea of not guilty.

The case was set for trial for April 15, 1975, and Appellant was to be tried along with his Co-Defendant, Twilla K. Belt. On April 15, 1975, after a jury was selected, Appellant's Co-Defendant entered a plea of guilty to these offenses and was placed on probation and sentenced to a term of ——— years in the Arkansas State Department of Corrections. Appellant, at that time, moved that his attorney be removed from his case. The Court granted his motion and relieved Jack Rose as his attorney. Further, the Appellant moved for a continuance of the trial of his cause and the motion was granted.

On May 28, 1975, the Appellant made bond in his cases and was released from jail on June 2, 1975, to Oklahoma authorities to be returned to Oklahoma for trial.

On June 9, 1975, Appellant entered a plea of guilty in Oklahoma to two offenses of Unlawful Distribution of a Controlled Substance and was sentenced to the Oklahoma Penitentiary for two concurrent sentences of two years.

On June 13, 1975, instead of requesting Appellant's bondsman to produce him for trial, the State requested that the Governor of Arkansas request Oklahoma to extradite Appellant to Arkansas for trial. On June 18, 1975, the Governor of Oklahoma honored the extradition and ordered Appellant returned to Arkansas for trial.

Appellant filed a Petition for a Writ of Habeas Corpus in the Pittsburg County District Court to prevent the extradition. The Petition was denied and Appellant ap-

pealed to the Oklahoma Court of Criminal Appeals. On July 29, 1975, that Court denied the Writ of Habeas Corpus and the extradition order was permitted to stand.

The record reflects that nothing further happened in the case until September 24, 1976, when Appellant's attorney was mailed a notice that Appellant's case was set for trial for October 14, 1976.

On October 6, 1976, Appellant filed a Motion to Dismiss his case because of a denial of a speedy trial. On October 20, 1976, a hearing was held by the Court, evidence and testimony was presented, arguments of counsel were made and the Court denied the Motion. Appellant objected and saved his exceptions to the order.

Appellant waived trial by jury. The Trial Court, after hearing the evidence, found Appellant not guilty of Forgery and guilty of Uttering. On October 20, 1976, judgment was entered (Filed October 26, 1976) on the finding of guilty and Appellant was sentenced to five (5) years in the Department of Corrections.

Appellant appealed the judgment to the Arkansas Supreme Court. On May 2, 1977, that Court delivered its opinion affirming the judgment of the Sebastian County Circuit Court.

On May 16, 1977, Appellant filed a Petition for Rehearing. On June 13, 1977, the Arkansas Supreme Court delivered its substitute opinion on rehearing and entered an order denying the rehearing. From the final judgment of the Arkansas Supreme Court affirming the conviction of Appellant comes this appeal.

ARGUMENT

Appellant believes that the question presented herein is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of the question. The reason the question is substantial is set out below.

The opinion of the Supreme Court of Arkansas has placed an intolerable and unconstitutional burden on a criminal defendant incarcerated in another jurisdiction if he ever places himself in a position of resisting return to this State for trial. Our Court has taken away the right to a speedy trial because a defendant has exercised his right to resist extradition to this State. The decision of the Arkansas Supreme Court would require a defendant to make a 180 degree turn from resisting trial to demanding trial in order to be entitled to his speedy trial right. Our Constitution has never required a defendant to give up one right to assert another.

In the present case the defendant resisted trial until July 29, 1975. Now the Supreme Court of Arkansas says he has the duty to demand trial. Appellant submits that this holding is absurd. Appellant contends that when he ceases resistance he has no burden to do anything in a situation such as is presented herein. He only has the duty to sit and wait for his trial. That is all that he could do in this case. He could not come back to Arkansas on his own because the Oklahoma authorities would not release him to come to Arkansas for trial on his own. Oklahoma would only release him to the Arkansas authorities or to Appellant's bondsman. However, Arkansas did not exercise its duty in this matter. It did not send a Sheriff for Appellant for trial

nor did it request Appellant's bondsman to produce him for trial.

It is clear that Arkansas is in bad faith in this matter. It exercised its right and duty to request Oklahoma to extradite Appellant. Oklahoma did as Arkansas requested and stood ready and willing to turn Appellant over to Arkansas for trial. However, Arkansas did not exercise good faith and execute its right and duty to go to Oklahoma and return Appellant to Arkansas for trial.

Arkansas knew it was putting Appellant in a precarious position in only going as far as it did. It did not use good faith and diligence in securing Appellant's presence for trial. Why did Arkansas wait for over a year to exercise a right that Oklahoma had granted to it? The only answer that is manifest is that Arkansas was in bad faith and wanted to prejudice Appellant by denying him a speedy trial. This bad faith and prejudice has denied Appellant due process of law and equal protection of the law.

A defendant has no duty to bring himself to trial. *Dickey v. Florida*, 398 U.S. 30 (1970). The State has the duty as well as the duty of insuring that the trial is consistent with due process. *Barker v. Wingo*, 407 U.S. 514 (1972). In *Hodges v. United States*, 408 F. 2d 543 (CA 8, 1969), the Court said:

> "The Government, and for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to 'a speedy . . . trial' is constitutionally guaranteed and, as such, is not to be honored only for the vigilant and the knowledgeable."

The Supreme Court of Arkansas said, in effect, that the trial court and the Prosecuting Attorney did not use due diligence and good faith in returning Appellant for trial when it made the following statement in its opinion. The Court said, "We do not mean to imply that the representative of the State or the trial court pursued this matter in an *urgent manner* after the Oklahoma Courts denied Faulk's petition." (Emphasis added)

This lack of diligence and good faith on the part of Arkansas after extradition was granted violated Appellant's right to a speedy trial, due process of law and equal protection of the law even though no demand was made because no such duty to demand trial existed. It was the duty of Arkansas to request Appellant's bondsman to produce him for trial or send the Sheriff to Oklahoma to get Appellant for trial after extradition was granted and Appellant ceased to resist. *Dickey v. Florida,* 398 U.S. 30 (1970).

In *Barker v. Wingo,* 407 U.S. 514 (1972), this Court rejected what it called the demand-waiver doctrine in speedy trial situations that some courts had adopted. This Court said:

> "We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right."

The Court went on to say that the approach it accepted was a balancing test, in which the conduct of both the prosecution and the defendant were weighed. The Court set out four factors to be considered. These factors are the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant. See *United States v. Simmons,* 338 F. 2d 804 (CA 2, 1964).

The length of the delay was too long. A delay of over 14 months is unreasonable especially where the case depends on eyewitness testimony. *United States v. Butler,* 426 F. 2d 1275 (CA 1, 1970).

The reason for the delay was the lack of diligence and good faith on the part of Arkansas to secure Appellant's presence after he ceased to resist extradition. *Dickey v. Florida,* 398 U.S. 30 (1970). Appellant could not return to Arkansas on his own because he was an Oklahoma prisoner. It would have been a simple matter for Arkansas to get him to court. It could have sent the Sheriff or Appellant's bondsman for him. The lack of action by the trial court and the Prosecuting Attorney was the reason for the delay.

The defendant had no duty to assert the right by demanding trial. He was on bond, incarcerated in Oklahoma, and subject to extradition at any time after July 28, 1975. *Pellegrini v. Wolfe,* 225 Ark. 459, 283 S.W. 2d 162. Arkansas was in bad faith in violation of the holding of this case.

There was prejudice to the Appellant in this case because of the delay. Prejudice can be shown in the light of the interests of criminal justice as outlined in *Smith v. Hooey,* 393 U.S. 374 (1969). These interests are: (1) To prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of the accused to defend himself. See *United States v. Ewell,* 383 U.S. 116. Further, these interests are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction. *Dickey v. Florida,* 398 U.S. 30 (1970).

These elements of prejudice are present here. It is clear that Appellant was incarcerated in Oklahoma for over 14 months from the time he ceased to resist extradition and Arkansas finally secured his presence for trial.

Anxiety and concern are clearly present. A wait of 14 months to know whether you will be tried, will be or not be convicted will get a concurrent or consecutive sentence, will be eligible for parole, etc., are important interests. See *State Ex Rel. Sanford v. District Court, Thirteenth Judicial District,* 551 P. 2d 1005 (Montana 1976).

The defense was impaired. The delay caused prejudice because of faded memories, loss of a witness (Ms. Belt), and lack of ability to test eyewitness testimony. This delay was one of the reasons Appellant waived a jury trial and was tried by the court. It is clear that when the factors are weighed they balance in favor of the Appellant.

The Appellant was incarcerated out of the State. The opinion of the Arkansas Supreme Court in construing the application of *Ark. Stat. Ann.* Sections 43-1708 and 1709 and Rule 28 of the Arkansas Rules of Criminal Procedure have placed an unconstitutional burden on Appellant as applied to him. It deprives him of equal protection of the laws to have to demand trial to get the benefits of these statutes and rules wherein a person in the State does not have to demand trial.

The interpretation placed on the statutes and rules as to speedy trial denies Appellant a speedy trial and due process of law to require him to demand return after he is available for trial when he ceased to resist extradition. These rights were violated by the Prosecution and the trial court, because they failed to exercise due diligence and

good faith in waiting 14 months to give Appellant a trial after he was available for trial.

The delay in trial was not the fault of Appellant. The delay was due to the inaction of Arkansas and the remedy of dismissal should be used.

CONCLUSION

Appellant submits that for the above reasons jurisdiction should be noted and the appeal accepted for decision.

Respectfully submitted,

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Appendix "A"

RUFUS ROLAND FAULK v. STATE OF ARKANSAS

CR-77-8

Substitute Opinion on Rehearing
delivered June 13, 1977
(In Banc)

Appeal from Sebastian Circuit Court, Fort Smith District JOHN HOLLAND, Judge; affirmed

ROBERT S. BLATT, for appellant

BILL CLINTON, Atty. Gen., by JOSEPH H. PURVIS, Asst. Atty. Gen., for appellee

DARRELL HICKMAN, Justice. Rufus Roland Faulk was charged with forgery, uttering and possession of stolen property in Sebastian County, Arkansas. He waived a jury, was found guilty of uttering, and sentenced to five years in the penitentiary.

Faulk's argument on appeal only goes to the question of a speedy trial. Faulk argues that he was denied a speedy trial, and the Arkansas law either requires dismissal of the charge or violates the Arkansas and United States Constitutions by denying an individual a speedy trial.

We find that Faulk was not denied a speedy trial, nor is the Arkansas law unconstitutional.

Before the Arkansas Rules of Criminal Procedure were adopted, the right to a speedy trial was governed by statute. See Ark. Stats. Ann. §§43-1708 and 43-1709. Since January 1, 1976, Rule 28 of the Rules of Criminal Procedure governs the right of an individual to a speedy trial. The statutes and

Rule 28 are both relevant since the time in this case transmits both 1975 and 1976. However, before examining the law, the dates and facts in this case should be discussed in detail.

February 11, 1975: Faulk was charged.

March 10, 1975: The information was amended.

April 15, 1975: The case was set and ready for a jury trial. It was continued on the motion of Faulk. Faulk moved to fire his lawyer and asked for a continuance. Both motions were granted.

May 21, 1975: Set for trial June 16th.

May 28, 1975: Faulk made bond.

June 2, 1975: He voluntarily surrendered to the State of Oklahoma.

June 9, 1975: He pleaded guilty in Oklahoma to two charges of unlawful distribution of a controlled substance and was sentenced to two years in the penitentiary.

June, 1975: Sometime prior to June 16th, Faulk filed a lawsuit in the Oklahoma courts to resist the efforts of Arkansas to bring him to trial.

June 13, 1975: Extradition instituted by Arkansas.

June 16, 1975: Trial date.

June 18, 1975: Extradition granted by the State of Oklahoma.

July 11, 1975: Case again set for trial July 14th.

July 14, 1975: Reset for the 21st of July on the motion of the State.

July 21, 1975: Trial date.

July 29, 1975: Oklahoma courts deny Faulk's request to stop extradition.

September 24, 1976: Case was again set for trial.

October 20, 1976: Faulk found guilty.

In this case, Faulk argues that he was out on bail, three terms of court had run, and, therefore, the charges should be dismissed. We have two Arkansas statutes which govern the facts in this case during 1975. Ark. Stats. Ann. §43-1708 provides that a person committed to prison must be brought to trial before the end of the second term of court unless the delay happens on the application of the prisoner. Ark. Stats. Ann. §43-1709 provides that if a person is out on bail, the state must bring the case to trial before the end of the third term of court. In this case, Faulk was in jail in Arkansas during the first term of court, applied for a continuance and it was granted. He was never free on bail because he voluntarily surrendered to the Oklahoma authorities before his second trial date; and, because of his application to the Oklahoma courts, there was another delay. We have distinguished the case of an individual free on bail in this state, or in an Arkansas jail or prison, from the case of an individual in an out-of-state prison. We have held that when a person is in prison in another state for a different crime, that person must affirmatively request a trial in order to activate these statutes and avail himself of its protection. *State v. Davidson,* 254 Ark. 172, 492 S.W. 2d 246 (1973). In the *Davidson* case we stated:

> However, one incarcerated in an institution of the federal government or that of some other jurisdiction must affirmatively request a trial in order to activate the statute and to avail himself of its protection. *Lee v. State,* 185 Ark. 253, 47 S.W. 2d 11 (1932). See also, *Bedwell v. Circuit Court of Lawrence County,* 248 Ark. 866, 454 S.W. 2d 304; *Pellegrini v. Wolfe, Judge,* 225 Ark. 459, 283 S.W. 2d 162 (1955).

Faulk did not request a trial at any time, and thereby activate the statute.

The Rules of Criminal Procedure, which we adopted January 1, 1976, govern part of the time in question. These rules also recognize that a person free on bail, in jail or prison in Arkansas, or in prison in another state must be treated differently. Essentially, the rules incorporate the two statutes that have been discussed. In computing time in which a prisoner must be brought to trial, certain periods of time are excluded. Rule 28.3(e) provides any period of delay resulting from the resistance of a prisoner to being returned to this state for trial will be excluded in computing time. In other words, if Faulk resisted return to the State of Arkansas, then the delay occasioned by his resistance, will be excluded in computing the time in which a prisoner must be brought to trial.

We find that Faulk resisted every effort to bring him to trial, both while he was in Arkansas and while he was in the penitentiary in Oklahoma. The first time his case was set for trial, on the date of the trial, he asked the court to permit him to discharge his attorney and grant him a continuance. Both motions were granted. After his case was set for trial the second time, but before the trial date, he voluntarily surrendered to the authorities in Oklahoma, pleaded guilty, and was sentenced to two years in the Oklahoma penitentiary. When Arkansas attempted to

extradite him for his second trial date, he filed a lawsuit and resisted all the efforts of Arkansas to bring him to trial.

Faulk argues that if his motion to dismiss the charges because he was denied a speedy trial is not granted as a result of Arkansas laws, then the laws are unconstitutional in violation of the Arkansas and the United States Constitution. We disagree.

The statutes of Arkansas and the rules of Criminal Procedure are designed to insure that individuals who want a speedy trial can have one. Also, they are designed to grant relief where the state neglects to try its cases within a reasonable time as defined by the statutes and rules. However, each case must also be examined for prejudicial factors. The criteria for judging the denial of the right to a speedy trial have been defined by the U.S. Supreme Court and adopted by this Court. See *Barker v. Wingo,* 407 U.S. 514 (1972), and *Curan v. State,* 260 Ark. 461, 541 S.W. 2d 923 (1976). We find no evidence of a violation of these criteria in this case. There is no evidence that the defendant asserted his right to a speedy trial at any time, was prejudiced by the length of delay, or that the delay was unreasonable. Faulk did not want a trial, speedy or otherwise. The constitutional right to a speedy trial cannot be a haven gained by legal trickery. It is a constitutional right that is available and enforced where the state fails to pursue a case to the prejudice of a defendant. We do not mean to imply that the representative of the state or the trial court pursued this matter in an urgent manner after the Oklahoma courts denied Faulk's petition. The record is simply silent regarding any negligence on the part of the state, or the trial court, and the record contains no evidence of any

prejudice to Faulk as a result of the delay. We find no merit to any of the arguments of Faulk.

Affirmed.

GEORGE ROSE SMITH and ROY, JJ., concur; FOGLEMAN and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent, because I think the majority has not really reached the gist of appellant's alternative argument. He correctly contends that more than three terms of court elapsed after he was available to the Arkansas authorities for trial. Extradition sought by the State of Arkansas was grnted. Appellant's resistance terminated on July 29, 1975, when appellant's petition for habeas corpus was denied and the extradition order remained in effect. This was during the June, 1975, term of the Circuit Court of Sebastian County. Faulk was then available to the Arkansas authorities at any time during the remainder of that term and, more importantly, during the ensuing three terms of court, i.e., the October, 1975, term, the February, 1976, term and the June, 1976, term. See Ark. Stat. Ann. §22-310 (Supp. 1975). The June, 1976 term expired on the first Monday in October, 1976. There was no trial setting prior to October 14 and his trial was not held until October 20. The only step taken by Faulk which could have delayed the trial, after his petition for habeas corpus was denied July 29, 1976, was his motion to dismiss because of a denial of a speedy trial, filed October 6, 1976, after the case had been set for trial on October 14. The period excluded under the Rules of Criminal Procedure ended on July 29, 1975, in my opinion. As I have pointed out, three terms of court commenced and ended between that date and the trial date of October 14, 1976, which was

a day of the fourth term after the excluded period. I find nothing in the Interstate Detainer Act or in the speedy trial rules which mandated a demand for trial by Faulk after he was available to the Arkansas authorities. The record discloses no reason why he could not have been brought to trial during any of the three terms that came and went. The court is, improperly in my opinion, imposing a burden on an accused to show when an excluded period ended. In effect, we are saying that a person available for trial at any time must demand trial or he cannot avail himself of the provisions of our speedy trial rules. This is certainly contrary to the spirit of *Holland v. State,* 252 Ark. 730, 480 S.W. 2d 597, which I took to end for all time the necessity for such a demand by one *available* for trial.

I would reverse the judgment and dismiss the case.

I am authorized to state that Mr. Justice BYRD joins in this opinion.

Supreme Court, U. S.
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VOLUME B

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APPENDIX "B"

RUFUS ROLAND FAULK v. STATE OF ARKANSAS

CR-77-8

Opinion delivered May 2, 1977
(In Banc)

Appeal from Sebastian Circuit Court, Fort Smith District
JOHN HOLLAND, Judge; affirmed.

ROBERT S. BLATT, for appellant.

BILL CLINTON, Atty. Gen., by JOSEPH H. PURVIS, Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Rufus Roland Faulk was charged with forgery, uttering and possession of stolen property in Sebastian County, Arkansas. He waived a jury, was found guilty of uttering, and sentenced to five years in the penitentiary.

Faulk's argument on appeal only goes to the question of a speedy trial. Faulk argues that he was denied a speedy trial, and the Arkansas law either requires dismissal of the charge or violates the Arkansas and United States Constitutions by denying an individual a speedy trial.

We find that Faulk was not denied a speedy trial, nor is the Arkansas law unconstitutional.

Before the Arkansas Rules of Criminal Procedure were adopted, the right to a speedy trial was governed by statute. See Ark. Stats. Ann. §§43-1708 and 43-1709. Since January 1, 1976, Rule 28 of the Rules of Criminal Procedure governs the right of an individual to a speedy trial. The statutes and Rule 28 are both relevant since the time in this case transmits both 1975 and 1976. However, before examining the law, the dates and facts in this case should be discussed in detail.

February 11, 1975: Faulk was charged.

March 10, 1975: The information was amended.

April 15, 1975: The case was set and ready for a jury trial. It was continued on the motion of Faulk. Faulk moved to fire his lawyer and asked for a continuance. Both motions were granted.

May 21, 1975: Set for trial June 16th.

May 28, 1975: Faulk made bond.

June 2, 1975: He voluntarily surrendered to the State of Oklahoma.

June 9, 1975: He pleaded guilty in Oklahoma to two charges of unlawful distribution of a controlled substance and was sentenced to two years in the penitentiary.

June, 1975: Sometime prior to June 16th, Faulk filed a lawsuit in the Oklahoma courts to resist the efforts of Arkansas to bring him to trial.

June 13, 1975: Extradition instituted by Arkansas.

June 16, 1975: Trial date.

June 18, 1975: Extradition granted by the State of Oklahoma.

July 11, 1975: Case again set for trial July 14th.

July 14, 1975: Reset for the 21st of July on the motion of the State.

July 21, 1975: Trial date.

July 29, 1975: Oklahoma courts deny Faulk's request to stop extradition.

September 24, 1976: Case was again set for trial.

October 20, 1976: Faulk found guilty.

In this case, Faulk argues that he was out on bail, three terms of court had run, and, therefore, the charges should be dismissed. We have two Arkansas statutes which govern

the facts in this case during 1975. Ark. Stats. Ann. §43-1708 provides that a person committed to prison must be brought to trial before the end of the second term of court unless the delay happens on the application of the prisoner. Ark. Stats. Ann. §43-1709 provides that if a person is out on bail, the state must bring the case to trial before the end of the third term of court. In this case, Faulk was in jail in Arkansas during the first term of court, applied for a continuance and it was granted. He was never free on bail because he voluntarily surrendered to the Oklahoma authorities before his second trial date; and, because of his application to the Oklahoma courts, there was another delay. We have distinguished the case of an individual free on bail in this state, or in an Arkansas jail or prison, from the case of an individual in an out-of-state prison. We have held that when a person is in prison in another state for a different crime, that person must affirmatively request a trial in order to activate these statutes and avail himself of its protection. *State v. Davidson,* 254 Ark. 172, 492 S.W. 2d 246 (1973).

Furthermore, we have held that when a person is in prison in another state and that state is a party to the Interstate Agreement on Detainers, then a duty exists on the prisoner to demand a speedy trial. See Ark. Stats. Ann. §43-3201 (Supp. 1975), *Curan v. State,* 260 Ark. 461, 541 S.W. 2d 923 (1976), and *Grooms v. State,* 260 Ark. —— (1977). Oklahoma is a party to the Interstate Agreement. Faulk did not demand a speedy trial, and since the delay was a result of his application, he is in no position to complain that Arkansas law in effect in 1975 requires his release.

The Rules of Criminal Procedure, which we adopted January 1, 1976, govern part of the time in question. These rules also recognize that a person free on bail, in jail or prison in Arkansas, or in prison in another state must be treated differently. Essentially, the rules incorporate the two statutes that have been discussed. In computing time in which a prisoner must be brought to trial, certain periods of time are excluded. Rule 28.3(e) provides any period of delay resulting from the resistance of a prisoner to being returned to this state for trial will be excluded in computing time. In other words, if Faulk resisted return to the State of Arkansas, then the delay occasioned by his resistance, will be excluded in computing the time in which a prisoner must be brought to trial. Also, Rule 28.1 (c) provides that the rule requiring a defendant to be brought to trial within two or three terms of court, as the case may be, does not apply to a case governed by the Interstate Agreement on Detainers Act.

We find that Faulk resisted every effort to bring him to trial, both while he was in Arkansas and while he was in the penitentiary in Oklahoma. The first time his case was set for trial, on the date of the trial, he asked the court to permit him to discharge his attorney and grant him a continuance. Both motions were granted. After his case was set for trial the second time, but before the trial date, he voluntarily surrendered to the authorities in Oklahoma, pleaded guilty, and was sentenced to two years in the Oklahoma penitentiary. When Arkansas attempted to extradite him for his second trial date, he filed a lawsuit and resisted all the efforts of Arkansas to bring him to trial.

Faulk argues that if his motion to dismiss the charges

because he was denied a speedy trial is not granted as a result of Arkansas laws, then the laws are unconstitutional in violation of the Arkansas and the United States Constitution. We disagree.

The statutes of Arkansas and the rules of Criminal Procedure are designed to insure that individuals who want a speedy trial can have one. Also, they are designed to grant relief where the state neglects to try its cases within a reasonable time as defined by the statutes and rules. However, each case must also be examined for prejudicial factors. The criteria for judging the denial of the right to a speedy trial have been defined by the U.S. Supreme Court and adopted by this Court. See *Barker v. Wingo*, 407 U.S. 514 (1972), and *Curan v. State*, supra. We find no evidence of a violation of these criteria in this case. There is no evidence that the defendant asserted his right to a speedy trial at any time, was prejudiced by the length of delay, or that the delay was unreasonable. Faulk did not want a trial, speedy or otherwise. The constitutional right to a speedy trial cannot be a haven gained by legal trickery. It is a constitutional right that is available and enforced where the state fails to pursue a case to the prejudice of a defendant. We do not mean to imply that the representative of the state or the trial court pursued this matter in an urgent manner after the Oklahoma courts denied Faulk's petition. The record is simply silent regarding any negligence on the part of the state, or the trial court, and the record contains no evidence of any prejudice to Faulk as a result of the delay. We find no merit to any of the arguments of Faulk.

Affirmed.

GEORGE ROSE SMITH and ROY, JJ., concur; FOGLEMAN and BYRD, JJ., dissent.

GEORGE ROSE SMITH, J., concurring. I join in the majority opinion, but I would also emphasize the last sentence in Rule 28.3(e) of the Rules of Criminal Procedure (1976), which expressly excludes from the computation of time:

> (a) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

When the State knows where the defendant is, he is to be considered unavailable either (a) if his presence for the trial cannot be obtained or (b) if he resists being returned to the state for trial. The two impediments to trial are stated disjunctively; either is sufficient. Alternative (b) cannot mean if the defendant *successfully* resists being returned or as long as he *successfully* resists, for those possibilities are already covered by alternative (a). In that restricted view, alternative (b) would add nothing to (a) and would therefore be meaningless. Hence alternative (b) should be taken to mean just what it says, that the defendant is to be considered unavailable if he resists being returned for trial, as this appellant did. By that resistance he declared in a positive way that he did not want a speedy trial in Arkansas. Having taken that stand, he should not be in a position to complain of a delay in his trial without first putting himself on record as asking for a trial. Otherwise he enjoys the contradictory benefits of having avoided

a trial by his resistance and at the same time of taking advantage of that resistance to seek a dismissal of the case for want of a speedy trial.

ROY, J., joins in this concurrence.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent, because I think the majority has not really reached the gist of appellant's alternative argument. He correctly contends that more than three terms of court elapsed after he was available to the Arkansas authorities for trial. Extradition sought by the Sstate of Arkansas was granted. Appellant's resistance terminated on July 29, 1975, when appellant's petition for habeas corpus was denied and the extradition order remained in effect. This was during the June, 1975, term of the Circuit Court of Sebastian County. Faulk was then available to the Arkansas authorities at any time during the remainder of that term and, more importantly, during the ensuing three terms of court, i.e., the October, 1975, term, the February, 1976, term and the June, 1976, term. See Ark. Stat. Ann. §22-310 (Supp. 1975). The June, 1976 term expired on the first Monday in October, 1976. There was no trial setting prior to October 14 and his trial was not held until October 20. The only step taken by Faulk which could have delayed the trial, after his petition for habeas corpus was denied July 29, 1976, was his motion to dismiss because of a denial of a speedy trial, filed October 6, 1976, after the case had been set for trial on October 14. The period excluded under the Rules of Criminal Procedure ended on July 29, 1975, in my opinion. As I have pointed out, three terms of court commenced and ended between that date and the trial date of October 14, 1976, which was a day of the fourth term after the excluded period. I find nothing in the Interstate Detainer Act or in the speedy trial

rules which mandated a demand for trial by Faulk after he was available to the Arkansas authorities. The record discloses no reason why he could not have been brought to trial during any of the three terms that came and went. The court is, improperly in my opinion, imposing a burden on an accused to show when an excluded period ended. In effect, we are saying that a person available for trial at any time must demand trial or he cannot avail himself of the provisions of our speedy trial rules. This is certainly contrary to the spirit of *Holland v. State*, 252 Ark. 730, 480 S.W. 2d 597, which I took to end for all time the necessity for such a demand by one *available* for trial.

I would reverse the judgment and dismiss the case.

I am authorized to state that Mr. Justice BYRD joins in this opinion.

APPENDIX "C"

RUFUS ROLAND FAULK v. STATE OF ARKANSAS

CR. 77-8

NOTICE OF APPEAL

Comes the Defendant-Appellant, Rufus Roland Faulk and hereby gives notice of appeal from the decision and opinion delivered on May 2, 1977, by the Arkansas Supreme Court affirming the judgment of the Sebastian County Circuit Court, dated October 20, 1976, and designates the entire judgment, opinion, and decision of the Arkansas Supreme Court as appealed from.

The appeal is taken to the United States Supreme Court under the provisions of 28 U.S.C. §1257.

/s/ Robert S. Blatt

CERTIFICATE OF SERVICE

I, Robert S. Blatt, hereby certify that I have mailed a copy of this Notice of Appeal to Appellee, State of Arkansas, by mailing a copy to its counsel of record, Attorney General of Arkansas, by depositing same in a United States Post Office, with first class postage, prepaid, to his address, Justice Building, Little Rock, Arkansas.

/s/ Robert S. Blatt

Filed on May 25, 1977, in the Arkansas Supreme Court.

APPENDIX "D"

RUFUS ROLAND FAULK v. STATE OF ARKANSAS

CR 77-8

SUPPLEMENTAL NOTICE OF APPEAL TO REVIEW

Comes the Defendant-Appellant, Rufus Roland Faulk and hereby gives Supplemental Notice of Appeal to Review the decision and opinion delivered on June 13, 1977, by the Arkansas Supreme Court affirming the judgment of the Sebastian County Circuit Court, dated October 20, 1976, and designates the entire judgment, opinion, and decision of the Arkansas Supreme Court as appealed from.

The appeal is taken to the United States Supreme Court under the provisions of 28 U.S.C. §1257.

/s/ Robert S. Blatt

CERTIFICATE OF SERVICE

I, Robert S. Blatt, hereby certify that I have mailed a copy of this supplemental Notice of Appeal to Review to Appellee, State of Arkansas, by mailing a copy to its counsel of record, Attorney General of Arkansas, by depositing same in the United States Post Office, with first class postage, prepaid, to this address, Justice Building, Little Rock, Arkansas.

/s/ Robert S. Blatt

Filed on July 29, 1977, in the Arkansas Supreme Court.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

RUFUS ROLAND FAULK ..... *Appellant*

vs.

STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS OR AFFIRM

The Appellee, pursuant to Rule 16 of the Rules of the United States Supreme Court, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Arkansas on the ground that the questions on which the decision of the cause depend are so manifestly unsubstantial that further argument is unwarranted.

I.

THE STATE STATUTES AND RULES INVOLVED AND THE NATURE OF THE CASE.

A.

STATE STATUTES AND RULES

This appeal questions the validity and constitutionality of Arkansas' statutes and rules of criminal procedure relating to the right of an accused to a speedy trial, particularly as the statutes and rules have been applied to Appellant. The Arkansas statutes involved are Ark. Stat. Ann. §§43-1708 and 43-1709 (Repl. 1964). These statutes can be found in Volume 4A at pages 130-131 of the Arkansas Statutes Annotated, 1964 replacement (Official Edition). The Arkansas Rule of Criminal Procedure involved is Rule 28. Arkansas' Rules of Criminal Procedure are not legislative enactments but rather are rules which have been promulgated by the Arkansas Supreme Court pursuant to a legislative grant of authority and in exercise of its supervisory powers conferred by the Arkansas Constitution. The Rules were adopted by PER CURIAM order of the Arkansas Supreme Court on December 22, 1975. The rules, which became effective January 1, 1976, govern the trial of all criminal cases in the inferior courts of the State of Arkansas having criminal jurisdiction. Rule 28 of the Arkansas Rules of Criminal Procedure can be found at pages 59 and 60 of the printed rules (Official Edition). The statutes and rules here involved have been set out verbatim in Appellant's Jurisdictional Statement.

Arkansas law distinguishes between an incarcerated person and a person free on bail for purposes of computing or quantifying an accused person's right to a speedy trial. Under the provisions of Ark. Stat. Ann. § 43-1708 (Repl. 1964) a person incarcerated in a prison or jail within the State of Arkansas must be brought to trial on the offense for which he is incarcerated before the expiration of two terms of the court having jurisdiction of the offense. If a trial is not had within the specified time frame the accused person is entitled to be discharged as to the offense for which he was incarcerated. The statute does not allow discharge on speedy trial grounds where, as in a motion for continuance, the delay in the trial was occasioned by the prisoner.

Likewise, Ark. Stat. Ann. §43-1709 (Repl. 1964) provides that a person that has been indicted or charged with an offense and released on bail must be brought to trial on the offense charged before the expiration of three terms of the court having jurisdiction of the offense. Failure to comply with this provision entitles the accused to discharge as to the offense charged. As with §43-1708, discharge on speedy trial grounds is precluded where the delay in the trial happened on the application of the accused.

Rule 28 of the Arkansas Rules of Criminal Procedure essentially restates the statutory provisions mentioned above. The Rule does, however, specify in much greater detail the periods of time which are "excluded" in computing the time for trial. Furthermore, Rule 28 has no effect in those cases which are expressly governed by the "Interstate Agreement on Detainers Act" (Act 705 of 1971).

B.

THE PROCEEDINGS BELOW

The Appellant and co-defendant, were charged by felony information on February 11, 1975, with the offenses of forgery and uttering in violation of Ark. Stat. Ann. § 41-1806. The charges were filed in the Fort Smith District of the Sebastian County Circuit Court.

The case was set for trial for April 15, 1975. The co-defendant Belt entered a plea of guilty and was sentenced to a term of years in the Arkansas Department of Correction. The appellant moved that his attorney Jack Rose be removed, and moved for a continuance, both of which were granted.

On May 21, 1975, appellant's trial was reset for June 16, 1975. Notice of the new trial setting was sent to appellant's attorney, Robert Blatt. On May 28, 1975, appellant made bond and on June 2, 1975, he voluntarily submitted himself to Oklahoma authorities.

On June 9, 1975, appellant pleaded guilty in Oklahoma to charges of unlawful distribution of a controlled substance, and was sentenced to a term of two (2) years in the Oklahoma State Penitentiary.

Upon learning of appellant's incarceration in Oklahoma, Prosecuting Attorney Charles Karr immediately requested extradition in an attempt to meet the June 16, 1975, trial date.

On June 18, 1975, the Governor of Oklahoma honored the

extradition and ordered Appellant returned to Arkansas for trial.

Appellant's trial was set for a third time for July 14, 1975. The state asked for a one week continuance, for an out-of-town witness, which was granted. The trial was therefore set for July 21, 1975.

Appellant filed a Petition for Writ of Habeas Corpus in the Pittsburg County (Oklahoma) District Court to prevent the extradition. This writ was denied and the appellant appealed to the Oklahoma Court of Criminal Appeals.

The July 21 trial date passed and the State of Arkansas had no notice of the judgment of the Oklahoma appellate court. The judgment was made and the writ denied on July 29, 1975.

From this time through the next year, appellant made no request for trial as required by Arkansas Rule of Criminal Procedure 29.1(c) and the Interstate Detainer Act, Ark. Stat. Ann. § 43-3201 (Supp. 1975).

On September 24, 1976, appellant's trial was set for October 14, 1976. On October 6, 1976, appellant filed a Motion to Dismiss because of a denial of speedy trial. On October 20, 1976, a hearing was held and the court denied the motion.

Appellant waived trial by jury, and the trial court heard the evidence and found the appellant not guilty of forgery and guilty of uttering. On October 20, 1976, judgment was entered and appellant was sentenced to a term of five (5) years in the Arkansas Department of Correction.

Appellant subsequently appealed to the Arkansas Supreme Court contending that he had been denied a speedy trial. The Arkansas Supreme Court, in its opinion handed down May 2, 1977, held that Appellant had caused the delay in his trial by leaving the State and thereafter resisting extradition. The Court further held that a person incarcerated in another state must make demand for trial before the speedy trial provisions of Ark. Stat. Ann. §43-1708 (Repl. 1964) are activiated. In the present case, Appellant did not demand a trial for some fourteen (14) months after his efforts to resist extradition had failed, nor did the State of Arkansas ever receive notice that extradition proceedings had terminated. Following the affirmance of his conviction, Appellant petitioned the Supreme Court of Arkansas for rehearing. Appellant's petition for rehearing was denied in a substitute corrected opinion handed down June 13, 1977.

II.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION PREVIOUSLY UNDECIDED BY THIS COURT.

The Arkansas Supreme Court has consistently followed the mandate of this Court's decision in ***Barker*** v. ***Wingo,*** 407 U.S. 514 (1972). See ***Curan*** v. ***State,*** 260 Ark. 461, 541 S.W. 2d 923 (1976). In ***Barker, supra,*** this Court declined to impose a quantified time limit on the right to a speedy trial as it pertained to state criminal proceedings. This Court wisely opted to adopt more flexible criteria in determining whether there had been a denial of the right to a speedy trial. According to this Court's decision in ***Barker, supra,*** each case must be considered on an ***ad hoc*** basis and certain factors scrutinized. Those factors

include length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The Supreme Court of Arkansas reviewed each of these factors in the present case and resolved them against Appellant.

If this Court decided to review the present case, the review would merely consist of an examination of the factual findings of the Arkansas Supreme Court, a practice in which this Court has previously declined to participate. ***Grayson*** v. ***Harris,*** 267 U.S. 352 (1924); ***Portland R. Co.*** v. ***Railroad Commission,*** 229 U.S. 397 (1912); ***Fry Roofing Co.*** v. ***Wood,*** 344 U.S. 157 (1952). The Supreme Court of Arkansas examined the record in the present case and found, essentially, that Appellant's conduct had caused the delay of which he now complains. This case is remarkably analagous to the adage "you can't have your cake and eat it too." Aside from this tenuous bit of literary merit, the case has none.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial that further argument is unwarranted, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Arkansas.

Respectfully submitted,

BILL CLINTON
Attorney General
State of Arkansas

ROBERT J. GOVAR
Assistant Attorney General

BY: _____

ROBERT ALSTON NEWCOMB
Assistant Attorney General

JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201
Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Robert Alston Newcomb, attorney for Appellee, do hereby certify that a copy of the foregoing Motion to Dismiss or Affirm, has been served upon the appellant by placing a copy of the foregoing in the United States mail, first class, postage prepaid to the Honorable Robert S. Blatt, attorney for appellant, P. O. Box 1825, Fort Smith, Arkansas 72901, on this 22nd day of August, 1977.

_____
ROBERT ALSTON NEWCOMB
Attorney for Appellee